

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ARTHUR EUGENE HERRERA,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 1:20-cv-01026-SAB

ORDER DIRECTING CLERK OF COURT TO  
RANDOMLY ASSIGN DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DENYING PLAINTIFF'S  
SOCIAL SECURITY APPEAL AND CLOSING  
THIS CASE

(ECF Nos. 19, 22, 23)

OBJECTIONS DUE WITHIN FOURTEEN  
DAYS

**I.**

**INTRODUCTION**

Arthur Eugene Herrera ("Plaintiff") seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant") denying his application for disability benefits pursuant to the Social Security Act. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. For the reasons set forth below, the Court recommends that Plaintiff's Social Security appeal be denied.

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## II.

### BACKGROUND

#### A. Procedural History

On August 23, 2017, Plaintiff filed a Title XVI application for supplemental security income alleging a period of disability beginning on July 2, 2009. (Admin. Rec. (“AR”) 15, 152, 177, ECF No. 10-1.)<sup>1</sup> Plaintiff’s application was initially denied on September 26, 2017, and denied upon reconsideration on November 14, 2017. (AR 80, 89.) On September 10, 2019, Plaintiff appeared for a hearing before Administrative Law Judge Mary P. Parnow (the “ALJ”). (AR 31-54.) On October 30, 2019, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 15-26.) The Appeals Council denied Plaintiff’s request for review on May 20, 2020. (AR 1-6.)

Plaintiff filed this action on July 23, 2020. (ECF No. 1.) On February 19, 2021, Defendant filed the administrative record (“AR”) in this action. (ECF No. 10.) On June 23, 2021, Plaintiff filed an opening brief. (Pl.’s Opening Br. (“Br.”), ECF No. 19.) On August 31, 2021, Defendant filed an opposition brief. (Def.’s Opp’n (“Opp’n”), ECF No. 22.) On September 14, 2021, Plaintiff filed a reply brief. (Pl.’s Reply (“Reply”), ECF No. 23.)

#### B. Hearing Testimony

Plaintiff appeared with counsel on September 10, 2019, for a hearing before the ALJ. (AR 31.) Plaintiff was 59 years old on the date of the hearing. (AR 35.) Plaintiff reached the twelfth grade, but did not graduate high school, and did not receive a GED. (AR 35-36.) Plaintiff last worked in 2006 as a laborer in the janitorial field. (AR 36.) The heaviest Plaintiff lifted was about 20 pounds of garbage.

Counsel amended the onset date to August 23, 2017, the date of application. (AR 37.) Counsel then examined Plaintiff. Plaintiff did not work a job where he made more than a thousand dollars per month, in the last fifteen years. Plaintiff worked putting up voting signs in

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<sup>1</sup> For ease of reference, the Court will refer to the administrative record by the pagination provided by the Commissioner and as referred to by the parties, and not the ECF pagination. However, the Court will refer to the parties’ briefings by their ECF pagination.

1 2018. (AR 37-38.)

2 Plaintiff stated the primary issues keeping him from working were his back problems and  
3 his hands. (AR 38.) Plaintiff stated his back pain on an average day was at a level 8 out of 10,  
4 with the pain shooting down his legs to his knees on both legs, but doesn't go to his feet. (AR  
5 38-39.) Plaintiff confirmed he had surgery on his left hand, and began stating he was going to  
6 have surgery on the right hand next month. (AR 39.) Prior to the surgery, Plaintiff's left wrist  
7 pain was at a level 10, because in the winter the hands would get extremely cold and feel like  
8 they were going to fall off. (AR 40.) Following surgery, Plaintiff's left hand pain stayed at a  
9 level 8. Plaintiff is right-handed.

10 Plaintiff gets bad migraine headaches about once per month that last about half an hour.  
11 Plaintiff had some visits with the heart doctor, but stated his heart is good, and takes minor  
12 medications such as baby aspirin. (AR 41.) Plaintiff had a kidney/renal problem, but stated the  
13 status was now "fine," but now his liver has fatty tissue around it, so he needs to lose weight.

14 Plaintiff has asthma and an inhaler. In 2011, Plaintiff punctured his lung in a car  
15 accident, and it is now hard for him to do things. (AR 41-42.) Plaintiff confirmed he only used  
16 the inhaler about once a month, but more when it is hot. (AR 42.)

17 Plaintiff stated he can only stand for about half an hour before having to sit down.  
18 Plaintiff stated he could be on his feet a total of about four hours a day, shifting up and down.  
19 Plaintiff stated he could do so five days a week for a job. (AR 43.) Plaintiff can walk about two  
20 blocks before having to take a break or stop. After walking up and down a flight of stairs,  
21 Plaintiff breathes hard and has pain in the hip.

22 Plaintiff stated he can lift and carry about 20 pounds comfortably. Plaintiff can sit in a  
23 chair about 30 minutes. Plaintiff stated he could only sit for about an hour or two throughout a  
24 work day, and thus it is more difficult to sit throughout the day than to stand. (AR 43-44.)

25 Plaintiff stated he can open a door handle but can't carry stuff because his grip issues  
26 make things fall out of his hands. (AR 44.) Plaintiff stated his left finger was cut off and sewed  
27 back on, so he can't make a complete fist. Plaintiff stated he can't hold a water bottle with his  
28 left hand because it would slip off. Plaintiff stated he cannot type, or use a pencil with his

1 fingers, but more specifically, that he can hold the pencil but his hand starts shaking.

2 Plaintiff lives in a house with his mother. (AR 44-45.) Plaintiff is able to cook for  
3 himself at home. (AR 45.) Plaintiff can clean, and confirmed he could clean a full bathroom by  
4 himself. Plaintiff confirmed he is able to go to the grocery store and shop for groceries by  
5 himself. Plaintiff has a driver's license, though has some difficulty driving at night due to vision  
6 issues. As for his hands holding the steering wheel, Plaintiff stated they cramp up, but he can do  
7 it and it depends. Plaintiff stated he can't drive a long distance because of the hands cramping  
8 up. (AR 46.)

9 Plaintiff was asked about hobbies in 2017 before filing for disability, that he cannot do  
10 now. (AR 46.) Plaintiff stated he used to do woodworking and work on his bike, but can't do  
11 that now because he can't grip things and they just fall out of his hands.

12 The ALJ asked how Plaintiff supported himself since 2006, and Plaintiff answered that he  
13 was incarcerated most of that time, until his release in 2014, though he had "been in and out  
14 since then." (AR 46.)

15 A vocational expert Mr. Leath ("VE") presented testimony. (AR 46-47.) Because the  
16 VE had some questions regarding past construction work, the ALJ then examined Plaintiff again.  
17 The ALJ questioned Plaintiff about whether the laborer position was as a custodian, or in  
18 construction, or whether these were different jobs within the last 15 years. (AR 47.) Plaintiff  
19 stated he worked at a construction cleaning business as a laborer in 2007. (AR 48.) Plaintiff  
20 stated he would operate a Bobcat, work with a shovel, and drive a dump truck. Plaintiff stated  
21 the heaviest weight he lifted on a regular basis was 20 pounds, the same as the custodian  
22 position. Plaintiff confirmed the construction job was full time. (AR 48-49.)

23 The VE then testified again. The VE classified the work as a composite job comprised of  
24 two components: (1) construction worker II, DOT code 869.687-026, SVP 2, heavy; and (2)  
25 industrial truck operator, DOT code 921.683-050, SVP 3, medium. (AR 49.) The VE classified  
26 the custodian job as cleaner, housekeeping, DOT code 323.687-014, SVP 2, light.

27 Counsel confirmed that there were no functional assessments from any treating source,  
28 no residual functional capacity ("RFC"), and no consultative exam. (AR 49.)

1 The ALJ presented a hypothetical person of the same age and education/work experience  
2 as Plaintiff, who is capable of a full range of medium work. (AR 50.) The VE stated that would  
3 rule out the cleaner/housekeeper job, but testified there were the following jobs in the national  
4 economy: (1) cleaner positions, DOT code 869.687-018, SVP 2, medium, with 100,000 jobs  
5 nationally; (2) packager positions, DOT code 920.587-018, SVP 2, medium, with 1,000 jobs  
6 nationally; and (3) laundry worker positions, DOT code 361.685-018, SVP 2, medium, with  
7 60,000 jobs nationally. (AR 50.)

8 Plaintiff's counsel then presented a hypothetical person limited to a full range of light  
9 work, who can lift 20 pounds occasionally and 10 pounds frequently; can sit, stand, or walk six  
10 hours in an eight hour day, with no exposure to pulmonary irritants, and the VE confirmed that  
11 past work be precluded. (AR 51.) The VE also confirmed there would be no transferable skills.

12 Counsel then presented a hypothetical without the pulmonary irritants but the same  
13 limitations, in addition to being limited to standing or walking only four hours of the day, and the  
14 VE confirmed that would preclude past relevant work. (AR 51.) The VE again confirmed there  
15 would be no transferable skills. (AR 51-52.)

16 Counsel then presented a hypothetical person that can stand four hours in a work day, but  
17 added the pulmonary irritant restriction back, and limited the hands bilaterally to occasional use  
18 for gripping, grasping, fingering, gross and fine. (AR 52.) The VE stated that would preclude all  
19 work.

20 A final hypothetical person had to miss 3 days of work per month, and the VE stated that  
21 would preclude all work. (AR 53.)

22 **C. The ALJ's Findings of Fact and Conclusions of Law**

23 The ALJ made the following findings of fact and conclusions of law as of the date of the  
24 decision, October 30, 2019:

- 25 • Plaintiff has not engaged in substantial gainful activity since August 23, 2017, the  
26 application date.
- 27 • Plaintiff has the following severe impairments: lumbar spondylosis, and obesity.
- 28 • Plaintiff does not have an impairment or combination of impairments that meets or

medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

- Plaintiff has the residual functional capacity to perform the full range of medium work as defined in 20 C.F.R. § 416.967(c).
- Plaintiff is capable of performing past relevant work as a cleaner/housekeeper (unskilled/light exertion), DOT 869.387-026. This work does not require the performance of work-related activities precluded by the Plaintiff's residual functional capacity.
- Plaintiff has not been under a disability, as defined in the Social Security Act, since August 23, 2017, the date the application was filed.

(AR 17-26.)

### III.

#### LEGAL STANDARD

To qualify for disability insurance benefits under the Social Security Act, the claimant must show that he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five-step sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. § 404.1520;<sup>2</sup> Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is disabled are:

Step one: Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

Step two: Is the claimant's alleged impairment sufficiently severe to limit his or her ability to work? If so, proceed to step three. If not, the claimant is not disabled.

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<sup>2</sup> The cases generally cited herein reference the regulations which apply to disability insurance benefits, 20 C.F.R. § 404.1501 et seq., and Plaintiff is also seeking supplemental security income, 20 C.F.R. § 416.901 et seq. The regulations are generally the same for both types of benefits. Further references are to the disability insurance benefits regulations, 20 C.F.R. §404.1501 et seq.

Step three: Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the claimant is disabled. If not, proceed to step four.

Step four: Does the claimant possess the residual functional capacity ("RFC") to perform his or her past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant's RFC, when considered with the claimant's age, education, and work experience, allow him or her to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

Congress has provided that an individual may obtain judicial review of any final decision of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g). In reviewing findings of fact in respect to the denial of benefits, this court "reviews the Commissioner's final decision for substantial evidence, and the Commissioner's decision will be disturbed only if it is not supported by substantial evidence or is based on legal error." Hill v. Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means more than a scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (internal quotations and citations omitted). "Substantial evidence is relevant evidence which, considering the record as a *whole*, a reasonable person might accept as adequate to support a conclusion." Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

"[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence." Hill, 698 F.3d at 1159 (quoting Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006)). However, it is not this Court's function to second guess the ALJ's conclusions and substitute the court's judgment for the ALJ's. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) ("Where evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.").

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## IV.

## DISCUSSION AND ANALYSIS

Plaintiff raises two primary challenges in this appeal: (1) that the ALJ's step two determination that Plaintiff's carpal tunnel syndrome ("CTS")<sup>3</sup>, and other hand/wrist conditions, were not severe, is not supported by substantial evidence; and (2) that the ALJ's RFC determination was unsupported by substantial evidence because the ALJ failed to obtain a medical opinion regarding Plaintiff's remaining ability to perform work-like functions. (Br. 5.)

**A. Whether the ALJ Erred in the Step Two Determination**

**1. General Legal Standards**

At step two of the five-step process, the ALJ assesses the medical severity of the claimant's impairments. 20 C.F.R. § 404.1520(a)(4)(ii). An impairment is "severe" if it significantly limits a claimant's ability to perform basic work activities for at least a consecutive 12-month period. See 20 C.F.R. § 416.909 ("Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months."). "An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities." 20 C.F.R. § 404.1522(a). If there is not any impairment or combination of impairments which significantly limits the claimant's physical or mental ability to do basic work activities, the claimant will be found to not have a severe impairment and he or she would not be disabled. 20 C.F.R. § 404.1520(c). Basic work activities are "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1522(b). This includes,

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of judgment;
- (5) Responding appropriately to supervision, co-workers and usual work

<sup>3</sup> The parties' briefing does not always clearly distinguish between cubital tunnel syndrome, and carpal tunnel syndrome, Dr. Wong's assessments of each condition as to both the right and left sides, and the ALJ's handling of the respective conditions. The Court will generally review and analyze the arguments from the parties as being applicable to both conditions and the ALJ's analysis of both, except where critical to the ALJ's respective determination. The Court will more generally refer to Plaintiff's ailments as "hand/wrist conditions," except where necessary for a specific aspect.

1 situations; and  
2 (6) Dealing with changes in a routine work setting.

3 20 C.F.R. § 404.1522(b).

4 At step two, the claimant has the burden to provide evidence of a medically determinable  
5 physical or mental impairment that is severe and that has lasted or can be expected to last for a  
6 continuous period of at least twelve months. Ukolov v. Barnhart, 420 F.3d 1002, 1004-05 (9th  
7 Cir. 2005); see also 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii); Bowen v. Yuckert, 482 U.S. 137,  
8 148 (1987) (Secretary may deny Social Security disability benefits at step two if claimant does  
9 not present evidence of a “medically severe impairment”). “[T]he ALJ must consider the  
10 combined effect of all of the claimant's impairments on her ability to function, without regard to  
11 whether each alone was sufficiently severe.” Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.  
12 1996). “An impairment or combination of impairments can be found ‘not severe’ only if the  
13 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an  
14 individual[’]s ability to work.’ ” Smolen, 80 F.3d at 1290 (citations omitted). Courts have found  
15 that step two is “a de minimis screening device [used] to dispose of groundless claims.” Webb v.  
16 Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (quoting S.S.R. No. 85-28 (1985); Smolen, 80 F.3d  
17 at 1290). “An impairment or combination of impairments can be found ‘not severe’ only if the  
18 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an  
19 individual[’]s ability to work.’ ” Smolen, 80 F.3d at 1290 (citing SSR 85-28). Step two is a “de  
20 minimis screening devise to dispose of groundless claims.” Id.; Webb v. Barnhart, 433 F.3d 683,  
21 687 (9th Cir. 2005) (same). An ALJ can only find that claimant’s impairments or combination of  
22 impairments are not severe “only when his conclusion is ‘clearly established by medical  
23 evidence’ ”. Webb, 433 F.3d at 687 (quoting S.S.R. 85-28). Thus, this Court “must determine  
24 whether the ALJ had substantial evidence to find that the medical evidence clearly established  
25 that [the claimant] did not have a medically severe impairment or combination of impairments.”  
26 Id.

27 In considering an impairment or combination of impairments, the ALJ must consider the  
28 claimant’s subjective symptoms in determining their severity. Smolen, 80 F.3d at 1290.

1 Symptoms are not medically determinable physical impairments and cannot by themselves  
2 establish the existence of an impairment. Policy Interpretation Ruling Titles II & XVI:  
3 Symptoms, Medically Determinable Physical & Mental Impairments, & Exertional &  
4 Nonexertional Limitations, SSR 96-4P (S.S.A. July 2, 1996). In order to find a claimant  
5 disabled, there must be medical signs and laboratory findings demonstrating the existence of a  
6 medically determinable ailment. Id. “[R]egardless of how many symptoms an individual  
7 alleges, or how genuine the individual’s complaints may appear to be, the existence of a  
8 medically determinable physical or mental impairment cannot be established in the absence of  
9 objective medical abnormalities; i.e., medical signs and laboratory findings . . . In claims in  
10 which there are no medical signs or laboratory findings to substantiate the existence of a  
11 medically determinable physical or mental impairment, the individual must be found not  
12 disabled at step 2 of the sequential evaluation process.” Id.

13 If the ALJ finds some severe impairment(s) exist, then she will proceed to consider all  
14 impairments—severe and non-severe—in the subsequent steps. See 20 C.F.R. § 416.923(c) (“In  
15 determining whether your physical or mental impairment or impairments are of a sufficient  
16 medical severity that such impairment or impairments could be the basis of eligibility under the  
17 law, we will consider the combined effect of all of your impairments without regard to whether  
18 any such impairment, if considered separately, would be of sufficient severity.”); 20 C.F.R. §  
19 416.945(a)(2) (“We will consider all of your medically determinable impairments of which we  
20 are aware, including your medically determinable impairments that are not ‘severe,’ as explained  
21 in §§ 416.920(c), 416.921, and 416.923, when we assess your residual functional capacity.”).  
22 Even if an ALJ errs by failing to include an impairment as severe at step two, when an ALJ  
23 nonetheless considers limitations resulting from the impairment in formulating the RFC, any  
24 error in not considering the impairment to be severe is harmless. Lewis v. Astrue, 498 F.3d 909,  
25 911 (9th Cir. 2007); Burch v. Barnhart, 400 F.3d 676 (9th Cir.2005); see also Petersen v.  
26 Barnhart, 213 F. App’x 600, 605 (9th Cir. 2006) (“In *Burch*, the ALJ discussed the claimant’s  
27 obesity and considered it in his RFC analysis . . . However, he did not mention obesity in his step  
28 two analysis . . . The *Burch* court assumed without deciding that this was legal error but

concluded that the error was harmless because it would not have impacted the ALJ's analysis at either step four or five. . . . at step five, the ALJ explicitly noted the impact of the claimant's obesity on her back problems . . . Given that the ALJ in this case did not address Petersen's weight in either the step two *or* step five contexts, the ALJ's failure to consider the impact of her obesity cannot be considered harmless error under *Burch.*").

2. The Relevant Medical Records and Findings of the ALJ

After a January 2018 left hand/wrist surgery, about a month later, in February of 2018, Plaintiff reported that his pain had been controlled. (AR 325.) Within the severity section of the opinion, the ALJ summarized this record, and noted the following:

This same month, he underwent a left sided carpal tunnel and trigger finger release of the long as well as ring fingers. The following month, the claimant's pain was described as controlled. The wounds had fully healed, but the left sided long and ring fingers had flexion contractures. There was stiffness with making a fist. Diagnoses consisted of left sided carpal tunnel syndrome (CTS), carpal tunnel syndrome, middle and ring trigger finger as well as ganglion (Ex. 11F). He was provided temporary disability for two months in February and three months in April 2018 (Ex. 5F).

(AR 18.) The post-surgical record noted that Plaintiff reported "Kern family will not pay for Digi sleeves. He called around multiple places and was told the same." (AR 325.) Dr. Wong also advised to continue working on extending the long and ring fingers, and that if insurance doesn't cover the Digi sleeves, that he can pay out of pocket, or "just work on stretching on his own." (AR 326.)

On April 4, 2018, Plaintiff's left hand was reevaluated. Plaintiff reported he had not had Digi sleeves made, that they were measured, but never called back. (AR 327.) There were no notations concerning the right hand. It was noted that Plaintiff "needs to follow-up as scheduled with therapy." (AR 328.) The ALJ acknowledged in the Step Two section that in "April 2018, the claimant continued to have some difficulty extending his long and ring fingers. He was developing contractures of the proximal interphalangeal (PIP) joints with approximately 15 degrees of lost motion. The claimant was advised to follow up as scheduled with physical therapy." (AR 18.)

On July 9, 2018, Dr. Wong observed that Plaintiff had full range of motion in his left hand and the PIP joints in the fingers were more supple and easily extended; that Plaintiff had not attended therapy and had still not used any Digi compression sleeves as recommended; that Plaintiff had persistent left shoulder pain; and improvement on the left side. (AR 329.) Plaintiff does not appear to dispute that this July 2018 record is the first record of right hand issues, when Dr. Wong noted Plaintiff had “right hand numbness, tingling, and intermittent pain,” that his “fifth digit is tender but not triggering,” and “Right Upper Extremity: All negative Durkin’s [with] [t]enderness over the fifth digit A1 pulley.” (AR 329.) Dr. Wong diagnosed Plaintiff with right side CTS and trigger finger of the right little finger. (AR 329-330.) Dr. Wong recommended that Plaintiff continue working on range of motion and strengthening on the left and continue “conservative treatment on the right including night splinting and taping the fifth digit PIP joint as needed.” (AR 330.)

The ALJ correctly acknowledged in the step two section that on July 9, 2018, Plaintiff first complained of right hand and wrist symptoms. (AR 19.) The ALJ incorporated the following summary of the July 2018 record into the opinion:

In July 2018, he had yet to go to physical therapy and was not using Digi sleeves. The claimant stated that his left hand had improved, but reported right hand numbness, tingling and intermittent pain. The fifth digit on the right was tender, but not triggering. Examination of the left upper extremity showed full range of motion in the hand and more supple PIP joints in the fingers with easier extension. Tinel’s was positive over the ulnar nerve at the mid forearm. Examination of the right upper extremity revealed tenderness over the fifth digit A1 pulley. He was diagnosed with right-sided CTS and trigger finger of the right little finger. Treatment for the right included night splinting and taping of the fifth digit PIPO joint. The Claimant was provided four months of temporary disability for his right hand. He was encouraged to continue working on range of motion and strengthening with respect to the left-hand (Ex. 11F).

(AR 18.)

On November 9, 2018, it appears Plaintiff visited Dr. Wong primarily for a reevaluation as well as for complaints of a painful rash, which Dr. Wong noted appeared to be shingles. (AR 317.) Dr. Wong’s physical exam showed that Plaintiff’s incision scar healed and he had full range of motion in his left hand; that the nerve was still transposed with no triggering; and

recommended that Plaintiff start physical therapy three times a week for eight weeks with massage and scar modification, range of motion, stretching, and strengthening. (AR 317.) There were no notations in the physical exam pertaining to the left hand/wrist. However, a complaint of bilateral hand numbness, tingling, and pain was noted. Temporary disability was continued for three months, with follow up in 3 months or sooner. (AR 317-318.)

On February 20, 2019, Dr. Wong wrote concerning a follow-up exam:

He states he feels “great a[t] times and good at others[.]” He feels the cold weather has worsened his arthritis recently. He is still having numbness and tingling in the mornings on the left and essentially unchanged on the right. He wants to pursue surgery on the right, but after he finishes moving both himself and his mother

... Left Upper Extremity: Elbow incision well-healed. Nerve still transposed. Full range of motion. Palmar incision well-healed. Thenar side of the scar is a little bit robust, however it is all much softer. Full range of motion in the hand. No triggering.

Right Upper Extremity: Positive Durkin’s with pain and paresthesias into the fourth and fifth digits. Positive Tinel’s at the cubital tunnel. No subluxation of the ulnar nerve. No triggering.

(AR 331.) Dr. Wong assessed bilateral carpal tunnel syndrome and cubital tunnel syndrome. (AR 332.) Dr. Wong recommended that Plaintiff use his left arm normally without restrictions and only avoid activities that may cause secondary injury. (AR 332.) For the right hand/wrist, Dr. Wong recommended continuing “conservative treatment,” continued temporary disability for four months, with follow up in three to four months. (AR 332.)

3. The ALJ’s Challenged Step Two Findings and Conclusions

Plaintiff summarizes the ALJ’s decision regarding the hand/wrist impairments at step two as based only on: (1) the fact Plaintiff put off right hand surgery until he and his mother had moved; and (2) support from the state agency consultant’s determination. Plaintiff argues that while this may appear to be a proper analysis of Plaintiff’s hand impairments, the conclusion is based on a flawed recitation of the evidence, and thus the determination is not supported by substantial evidence.

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1           Within the step two section, the ALJ made the following findings and determinations as  
2 to Plaintiff's right and left hand/wrist impairments:

3           With respect to the claimant's bilateral CTS and trigger fingers as  
4 well as left-sided cubital tunnel syndrome and ganglion, he did  
5 well post surgical release on the left despite failing to follow  
6 through with recommended physical therapy and Digi sleeves. By  
7 July 2018, the claimant endorsed an improvement with regard to  
8 his left hand/wrist and had full range of motion (Exs. 9F, 11F).  
9 This same month, he complained of right hand/wrist symptoms for  
10 the first time. Conservative treatment was recommended. In  
11 February 2019, the claimant was encouraged to use his left arm  
normally without restriction. At this time, he said that he wanted  
to pursue right-sided surgery but wanted to wait until he was  
finished moving himself and his mother. There is no evidence in  
the record to show that the claimant followed up with any provider  
for his hand complaints after February 2019 (Ex. 11F). At the  
hearing, he testified that he was able to cook, shop and clean,  
including the entire bathroom.

12           The undersigned finds that the claimant left hand/wrist  
13 impairments are nonsevere in nature because they did not meet the  
14 12 month durational requirement of the Social Security Act since  
15 there was documented improvement in his ability to use the left  
16 hand by July 2018 and he was encouraged to use his left arm  
17 normally without restriction in February 2019 (Exs. 9F, 11F).  
18 With respect to his right hand/wrist impairments, the undersigned  
also find[s] these to be nonsevere in nature since the claimant  
decided to put off a surgical procedure until he was finished  
moving himself and his mother and has not followed up with a  
provider since (Ex. 11F). Further, his admitted ability to cook,  
shop and clean supports a finding that these impairments are  
nonsevere.

19           The State Agency consultants' assessments found that the claimant  
20 did not have a severe impairment (Exs. 1A, 3A). The undersigned  
21 find[s] these opinions persuasive with respect to the above listed  
22 impairments because they are consistent with the evidence that  
23 shows limited treatment, no end organ damage, normal  
24 cardiovascular and respiratory examinations, controlled  
25 hypertension, uncomplicated diabetes, his acknowledgement that  
26 his renal cyst had resolved, the fact that the claimant only utilized  
27 an inhaler approximately once a month, his documented  
improvement with regard to his left hand by July 2018, the  
recommendation that he use the left arm without restrictions in  
February 2019, the fact the claimant put off surgery on the right  
until he was done moving himself and his mother, his failure to  
follow up with regard to his right hand after February 2019, his  
acknowledgment that he only experiences one headache per month  
that lasted for 30 minutes as well as the fact that there has been  
only one visit for GERD and sinusitis (Exs. 1F, 2F, 4F, 5F, 6F, 7F,  
10F, 11F, 12F, testimony).

28           The undersigned considered all of the claimant's medically

determinable impairments, including those that are not severe, when assessing the claimant's residual functional capacity.

(AR 19-20.)

4. Plaintiff's Primary Arguments

Plaintiff submits that the mere fact that he elected to hold off on his surgical intervention does not mean the limitations caused by this impairment were not severe enough to meet the *de minimis* hurdle of a step two evaluation. Plaintiff argues the ALJ's reliance on the hesitation to move forward with surgery until after the move is an impermissible cherry-picking of the evidence. Ghanim v. Colvin, 763 F.3d 1154, 1164 (9th Cir. 2014) (an ALJ may not pick and choose evidence unfavorable to the claimant while ignoring evidence favorable to the claimant). Plaintiff contends the ALJ relied on one indication that he put off his surgery until he finished moving but ignored: that Plaintiff testified he was scheduled to have surgery on the right hand; the multiple positive findings contained throughout the record; as well as Dr. Wong's repeated notations that Plaintiff was unable to work. (AR 39, 329, 331.) Plaintiff emphasizes that although Dr. Wong recommended Plaintiff use his left hand without restriction in February 2019, Dr. Wong continued to find Plaintiff temporarily disabled for another four months. (AR 331.) Plaintiff argues this indicates the right hand pain alone was significant enough to cause this level of disability.

Plaintiff contends the evidence showed as to the right hand: Plaintiff's right hand had tenderness over the fifth digit A1 pulley (AR 329); there was a positive Durkin's with pain and paresthesia into the fourth and fifth digits of the right hand (T 331); and he had positive Tinel's at the cubital tunnel (T 331). Plaintiff argues that given Dr. Wong continued Plaintiff's off-work restrictions for his right hand, this evidence is certainly indicative of severe limitations, and the ALJ improperly attempted to interpret medical records. Recio v. Berryhill, CV 18-2954-E, 2018 WL 4859257, at \*2 (C.D. Cal. Oct. 5, 2018) ("The ALJ could not properly rely on the ALJ's own lay understanding to interpret medical records and the medical examination results so as to gauge the functional seriousness of Plaintiff's severe impairments.").

Further, Plaintiff contends the ALJ's statement that she found the state agency

consultants' assessments of non-severe impairments persuasive as to Plaintiff's hand impairments (AR 20), is utterly confusing as the state agency consultants did not consider Plaintiff's carpal tunnel syndrome (AR 70), and rather only considered evidence from Dr. Bichai and the cardiologists (AR 69), neither of whom treated Plaintiff for his hand impairments. Therefore, Plaintiff submits that the state agency consultants never made any determination as to whether Plaintiff's hand impairments constituted a severe impairment., and cannot provide substantial evidence for the ALJ's conclusions as the ALJ "had to provide an inaccurate report of the assessments to scrounge up the findings she needed." (Br. 10, citing Ghanim, 763 F.3d at 1164; Ramirez v. Berryhill, 739 F. App'x 428, 431 (9th Cir. 2018) (mischaracterization of the evidence cannot provide sufficient justification for the decision).

5. The Court finds the ALJ's Step Two Determinations to be Proper and Free From Remandable Legal Error

Defendant directs the Court to the records from Dr. Wong, summarized above. Defendant emphasizes that in April and May of 2019, Plaintiff reported no recent treatment or examination by a doctor and no recent hospitalizations. (AR 223-24, 227-29). Plaintiff does not dispute this fact. Defendant thus submits that this is the extent of the evidence regarding Plaintiff's hand/wrist conditions. Defendant argues that substantial evidence supports the ALJ's finding that Plaintiff had non-severe CTS. The Court agrees. The Court finds here that the ALJ's severity determination as to Plaintiff's right and left hand conditions was proper, and the ALJ had substantial evidence to find that the medical evidence clearly established that Plaintiff did not have a medically severe impairment or combination of impairments. Smolen, 80 F.3d at 1290; Webb, 433 F.3d at 687.

Plaintiff does not significantly present any arguments as to the left hand/wrist and the ALJ's determination as to the left side, including the determination that it did not meet the 12-month duration requirement. (AR 19-20.) The Court finds the ALJ's determination to be supported by substantial evidence, particularly because of the fact that Plaintiff's treating doctor opined that he should resume using the left side normally in February of 2019. See Chaudhry v. Astrue, 688 F.3d 661, 664, 668, 672 (9th Cir. 2012) (ALJ properly excluded carpal tunnel

1 syndrome as a severe impairment where, despite a treating doctor's notation of carpal tunnel  
2 syndrome and a trial of wrist splints under "Action Plan," as the accompanying objective  
3 findings documented "[n]o wrist pain, swelling or stiffness, no wrist joint pain, no swelling of  
4 the wrist joint, and no stiffness of the wrist joint," and this evidence provided no support that the  
5 condition would last more than 12 months); Montijo v. Sec'y of Health & Hum. Servs., 729 F.2d  
6 599, 601 (9th Cir. 1984) ("There is no evidence, however, that the May 1976 accident or the  
7 Addisonian crisis caused a severe physical impairment lasting for longer than twelve months.  
8 The subjective complaints of the claimant alone do not overcome his statutory burden."); Fuhrer  
9 v. Berryhill, No. CV 16-4066-PLA, 2017 WL 1025163, at \*5 (C.D. Cal. Mar. 16, 2017)  
10 ("Because there were no signs or findings during the relevant period supporting the existence of  
11 a severe medically determinable impairment that was expected to last for a continuous period of  
12 at least 12 months, and the only symptoms were those reported by plaintiff, substantial evidence  
13 supported the ALJ's finding that plaintiff did not meet her burden at step two to show she  
14 suffered from a severe medically determinable impairment during the relevant period that is  
15 expected to last for a continuous period of at least 12 months and there was no error.").

16 Despite Plaintiff's framing of the ALJ's findings as to the right hand/wrist impairments  
17 as based only on: (1) the fact Plaintiff put off right hand surgery until he and his mother had  
18 moved; and (2) support from the state agency consultant's determination (Br. 9), the ALJ  
19 connected the fact Plaintiff was waiting until after moving with the fact that he had not followed  
20 up with a medical provider since that visit. (See AR 19 ("There is no evidence in the record to  
21 show that the claimant followed up with any provider for his hand complaints after February  
22 2019"); AR 20 ("the claimant decided to put off a surgical procedure until he was finished  
23 moving himself and his mother and has not followed up with a provider since").) Additionally  
24 neglected in briefing is the ALJ's further reliance on the Plaintiff's admitted functional abilities  
25 and the ALJ's statement that "his admitted ability to cook, shop and clean supports a finding that  
26 these impairments are nonsevere." (AR 20; AR 19 ("At the hearing, he testified that he was able  
27 to cook, shop and clean, including the entire bathroom.")).

28 Again, the ALJ's sentence continues "and has not followed up with a provider since."

(AR 20.) The Court finds it significant that there are no medical records proffered as to the hand/wrist conditions after February of 2019. See Aceves v. Berryhill, No. 2:17-CV-1644-EFB, 2018 WL 4447735, at \*6 (E.D. Cal. Sept. 18, 2018) (“Despite her critique, plaintiff does not offer any explanation for her failure to obtain further treatment for her shoulder. Furthermore, there is nothing in the record suggesting plaintiff was unable to obtain treatment for her shoulder after September 2014 . . . . In sum, although plaintiff’s shoulder condition was undoubtedly severe immediately after the fracture and for some months thereafter, the severity did not meet the 12 month duration requirement. Accordingly, plaintiff has failed to show that the ALJ erred in finding her shoulder impairment was non-severe.”). The mere existence of an impairment is insufficient proof of a disability. Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993.) When applying for disability benefits it is the claimant’s duty to prove that he is disabled. 42 U.S.C. § 423(c)(5)(A).

Further, even if the ALJ’s reliance on the delay of surgery or lack of follow-up after February 2019 did not properly provide substantial evidence for the severity finding, the Court finds the ALJ’s citation to daily activities is supported by substantial evidence. As summarized above and described by the ALJ, Plaintiff testified that he was able to cook, clean a full bathroom by himself, and shop for groceries in a store. (AR 20, 22-23, 45, 187-89.) The ALJ properly used the testified daily activities to support the non-severity finding. See Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998) (ALJ properly found that claimant did not have any severe impairments because even though the evidence showed that she experienced some back pain as well as vaginal bleeding, she was doing the laundry, cleaning the house, vacuuming, mopping, dusting and grocery shopping, activities that require “physical functioning and use of her back,” and each was “inconsistent with [claimant’s] claim that she suffered from a severe physical disability during this time”); Taylor v. Astrue, 386 F. App’x 629, 632 (9th Cir. 2010) (unpublished) (“There is also substantial evidence from a variety of sources—including . . . Taylor’s own and her friend’s reports of her daily activities since her alleged date of onset . . . that directly supports the ALJ’s finding that Taylor’s impairments are not ‘severe.’ ”); Roberts v. Berryhill, No. 216CV1232JCMGWF, 2019 WL 952559, at \*5 (D. Nev. Feb. 27, 2019) (“[T]he

1 court finds that the ALJ properly considered the lack of objective medical evidence of a severe  
2 impairment, as well as evidence of plaintiff's daily living activities in determining that plaintiff's  
3 impairments are not 'severe' under the Social Security Act.").

4 Overall, given the above summary of the medical records and the ALJ's description  
5 thereof, the Court disagrees with the Plaintiff's contention that the ALJ "cherry-pick[ed]"  
6 evidence. As the Court discussed above, the ALJ extensively discussed the full evidence of  
7 record concerning Plaintiff's interactions with Dr. Wong concerning both the left and right hand  
8 and wrist impairments. The Court agrees with Defendant that while Plaintiff's arguments focus  
9 on the hesitation to move forward into surgery until after moving, Plaintiff fails to address the  
10 other relevant evidence of record discussed by the ALJ, including the limited physical  
11 examination findings, the fact that Dr. Wong never imposed any specific functional limitations  
12 regarding his right hand, that Plaintiff had not followed up for treatment, and the activities of  
13 daily living. The Court finds Plaintiff's argument isolates a single aspect of the opinion and does  
14 not take into account all of the evidence that the ALJ considered in conjunction when  
15 determining that Plaintiff did not have severe hand/wrist conditions under the regulations.  
16 Significantly, Plaintiff has not challenged the daily activity findings, nor the ALJ's reliance on  
17 the fact that Plaintiff did not follow up after the February 2019 visit with Dr. Wong.

18 The Court is also unconvinced by Plaintiff's argument that the ALJ improperly  
19 considered the State agency medical consultants' assessment of non-severe impairments as  
20 persuasive because they did not consider Plaintiff's CTS and only considered records from Dr.  
21 Bichai who did not treat him for hand impairments. While the ALJ could have specifically  
22 delineated between conditions that the non-examining physicians reviewed records pertaining to,  
23 the Court does not find harmful error in light of the totality of the ALJ's analysis, the medical  
24 evidence of record reviewed by the state agency physicians and not reviewed, and the absence of  
25 any greater functional limitation opinion from a physician. Rather the ALJ's overall statement  
26 that the opinions were persuasive with respect to the ailments discussed in the severity section of  
27 the opinion is supported by substantial evidence, and the ALJ's specific other support within that  
28 sentence. Again, the ALJ made the following findings in stating the opinions to be persuasive as

1 to the conclusion that these impairments were not severe:

2           The State Agency consultants' assessments found that the claimant  
3 did not have a severe impairment (Exs. 1A, 3A). The undersigned  
4 find[s] these opinions persuasive with respect to the above listed  
5 impairments because they are consistent with the evidence that  
6 shows limited treatment, no end organ damage, normal  
7 cardiovascular and respiratory examinations, controlled  
8 hypertension, uncomplicated diabetes, his acknowledgement that  
9 his renal cyst had resolved, the fact that the claimant only utilized  
10 an inhaler approximately once a month, his documented  
11 improvement with regard to his left hand by July 2018, the  
recommendation that he use the left arm without restrictions in  
February 2019, the fact the claimant put off surgery on the right  
until he was done moving himself and his mother, his failure to  
follow up with regard to his right hand after February 2019, his  
acknowledgment that he only experiences one headache per month  
that lasted for 30 minutes as well as the fact that there has been  
only one visit for GERD and sinusitis (Exs. 1F, 2F, 4F, 5F, 6F, 7F,  
10F, 11F, 12F, testimony).

12 (AR 19-20.) While the state agency physicians did not review medical records pertaining to the  
13 hands and wrist conditions, the ALJ's conclusion that the opinions finding no severe ailments  
14 were overall persuasive to the non-severity findings is supported by substantial evidence given  
15 the listed overall factors do in fact support a finding that the non-examining physicians' ultimate  
16 conclusions are correct, even in the absence of a review by those physicians of later records  
17 pertaining to certain conditions, as an absence of records still may be a proper consideration in  
18 finding an ailment non-severe. See Elsey v. Saul, 782 Fed.Appx. 636, 637 (9th Cir. 2019)  
19 (unpublished) ("Additionally, the fact that [reviewing physician] Dr. Hale did not consider all of  
20 the evidence in his determination does not require the ALJ to discount his opinion. The  
21 regulations require that an ALJ evaluate the degree to which a non-examining source considers  
22 the evidence, not that a failure to consider all evidence requires the source to be discounted." ).  
23 Further, in the RFC section of the opinion, the ALJ concluded that as for the impairments the  
24 ALJ did find severe, obesity and the spinal condition, the non-examining physicians did not  
25 adequately consider such ailments. The Court finds this provides additional support to conclude  
26 the ALJ's analysis was proper and that the ALJ weighed the various evidence in the record in a  
27 reasonable manner. See Smolen, 80 F.3d at 1279 ("Substantial evidence" means more than a  
28 scintilla, but less than a preponderance); Thomas, 278 F.3d at 955 ("Substantial evidence is

1 relevant evidence which, considering the record as a *whole*, a reasonable person might accept as  
2 adequate to support a conclusion.”); Burch, 400 F.3d at 679 (“Where evidence is susceptible to  
3 more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.”).

4 Plaintiff cites to Edlund, for the proposition that the Ninth Circuit has found that the  
5 ALJ’s determination that a claimant’s mental impairment is not severe is unsupported by  
6 substantial evidence when it had been diagnosed by an examining psychologist. Edlund v.  
7 Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001), as amended on reh'g (Aug. 9, 2001) (“Given the  
8 uncontroverted diagnosis of the examining psychologist, Dr. Bremer, as to Edlund's symptoms of  
9 agitated depression and anxiety, we believe the ALJ lacked substantial evidence for dismissing  
10 Edlund's claim of a severe mental impairment at Step 2.”). However, there, “the ALJ erred in  
11 failing to meet, either explicitly or implicitly, the standard of clear and convincing reasons  
12 required to reject an uncontradicted opinion of an examining \*psychologist.” Id. at 1158–59.  
13 That is not the standard nor argument submitted on appeal here.

14 Finally, neither party addresses whether the ALJ’s discussion of the Plaintiff’s hand/wrist  
15 impairments in the RFC section means any error in the severity analysis is harmless. The Court  
16 finds that to be so, and thus any error in the severity analysis would be harmless given the ALJ’s  
17 RFC analysis sufficiently discussed the hand/wrist impairments. The ALJ must consider both  
18 severe and nonsevere medically determinable impairments when determining the RFC. See 20  
19 C.F.R. § 404.1545(a)(2) (“We will consider all of your medically determinable impairments of  
20 which we are aware, including your medically determinable impairments that are not ‘severe,’ as  
21 explained in §§ 404.1520(c), 404.1521, and 404.1523, when we assess your residual functional  
22 capacity.”); 20 C.F.R. § 404.1545(e) (“When you have a severe impairment(s), but your  
23 symptoms, signs, and laboratory findings do not meet or equal those of a listed impairment in  
24 appendix 1 of this subpart, we will consider the limiting effects of all your impairment(s), even  
25 those that are not severe, in determining your residual functional capacity.”). As noted above,  
26 even if an ALJ errs by failing to include an impairment as severe at step two, when an ALJ  
27 nonetheless considers limitations resulting from the impairment in formulating the RFC, any  
28 error in not considering the impairment to be severe is harmless. Lewis, 498 F.3d at 911; Burch,

1 400 F.3d 676; Petersen, 213 F. App'x at 605.

2 Here, the ALJ stated they “considered all of the claimant’s medically determinable  
3 impairments, including those that are not severe, when assessing the claimant’s residual  
4 functional capacity.” (AR 20.) Specifically, in making the RFC assessment, the ALJ noted the  
5 following regarding Plaintiff’s hand/wrist ailments:

6 [Plaintiff] testified that he was unable to work in any capacity due  
7 to difficulties with his back and hands. The claimant said that his  
8 back pain was about an eight on a 10 point scale and radiated down  
9 both legs to his knees. He stated that he underwent a surgical  
10 procedure to the left wrist in 2018. Prior to the surgery, the  
11 claimant testified that his left wrist pain was a 10 on a 10 point  
12 scale. He said that after the surgical procedure, the left wrist pain  
13 decreased to an eight on a 10 point scale. The claimant stated that  
14 his right hand/wrist pain was an eight on a 10 point scale. He  
15 testified that he was right-handed . . . The claimant said that he had  
16 problems with fine and gross manipulation, but was able to open a  
door as well as carry a water bottle without pain. He endorsed  
having no ability to grip with the left hand. The claimant stated  
that he lived in a house with his mother. He testified that he was  
able to cook, shop and clean, including the entire bathroom. The  
claimant acknowledged having a California driver’s license and  
said that he had difficulties driving long distances because his  
hands cramped up. He said that he was unable to engage in his  
woodworking hobby or do mechanical repairs because of his  
inability to grip objects.

17 After careful consideration of the evidence, the undersigned finds  
18 that the claimant’s medically determinable impairments could  
19 reasonable be expected to cause the alleged symptoms; however,  
20 the claimant’s statements concerning the intensity, persistence and  
limiting effects of these symptoms are not entirely consistent with  
the medical evidence and other evidence in the record for the  
reasons explained . . .

21 . . . The State Agency consultants’ assessments found that the  
22 claimant did not have a severe impairment (Exs. 1A, 3A). The  
23 undersigned finds these opinions to be unpersuasive because they  
did not adequately consider the claimant’s lumbar spine  
impairment in combination with his obesity, which would  
reasonably cause some functional limitations.

24 Based on the foregoing, the undersigned finds the claimant has the  
25 above residual functional capacity assessment, which is supported  
26 by the substantial weight of the objective medical evidence that  
27 demonstrated minimal treatment, the conservative treatment that  
28 consisted of only a prescription for Norco and baclofen without a  
referral to physical therapy or a spine specialist, the multiple  
occasions wherein no spinal tenderness was found upon  
examination, the good range of motion, the rather good extent of  
the claimant’s activities of daily living that include cooking,

shopping, cleaning and caring for his mother as well as the fact that no treating or examining physician has provided greater functional limitations (Exs. 1F, 2F, 4F, 7F, 9F, 10F, 11F, 12F, testimony).

The undersigned finds that even if the claimant continued to use methamphetamine, he would be able to perform the range of work described above.

(AR 22-24.) Based on the ALJ's discussion of the Plaintiff's testimony concerning the hand/wrist impairments, even if the ALJ had erred in at step two, the Court would find any error in the severity analysis to be harmless. Lewis, 498 F.3d at 911; Burch, 400 F.3d 676; Petersen, 213 F. App'x at 605.

For all of the above reasons, the Court concludes the ALJ had substantial evidence to find that the medical evidence clearly established that Plaintiff did not have a medically severe impairment or combination of impairments of the hand/wrists. Webb, 433 F.3d at 687; Chaudhry, 688 F.3d at 664. Additionally, any error in the severity analysis is harmless. Lewis, 498 F.3d at 911.<sup>4</sup>

#### **B. Whether the ALJ's RFC Determination is Erroneous**

Plaintiff next argues that the ALJ's RFC determination was unsupported by substantial evidence as the ALJ failed to obtain a medical opinion regarding Plaintiff's remaining ability to perform work-like functions.

##### 1. Legal Standard for the RFC Determination

A claimant's RFC is "the most [the claimant] can still do despite [their] limitations." 20 C.F.R. § 416.945(a)(1). The RFC is "based on all the relevant evidence in [the] case record." 20 C.F.R. § 416.945(a)(1). "The ALJ must consider a claimant's physical and mental abilities, § 416.920(b) and (c), as well as the total limiting effects caused by medically determinable impairments and the claimant's subjective experiences of pain, § 416.920(e)." Garrison v. Colvin, 759 F.3d 995, 1011 (9th Cir. 2014). At step four the RFC is used to determine if a

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<sup>4</sup> The Court need not address Defendant's argument that Dr. Wong's temporary disability opinion is not considered a medical opinion under the regulation; and is "inherently neither valuable nor persuasive" and requires no analysis or discussion in the ALJ decision, 20 C.F.R. § 416.920b(c), (c)(3), (c)(3)(i). Such finding is not necessary to uphold the ALJ's decision.

claimant can do past relevant work and at step five to determine if a claimant can adjust to other work. Garrison, 759 F.3d at 1011. “In order for the testimony of a VE to be considered reliable, the hypothetical posed must include ‘all of the claimant’s functional limitations, both physical and mental’ supported by the record.” Thomas, 278 F.3d at 956.

When applying for disability benefits, the claimant has the duty to prove that she is disabled. 42 U.S.C. § 423(c)(5)(A). The ALJ has an independent “duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.” Widmark v. Barnhart, 454 F.3d 1063, 1068 (9th Cir. 2006) (quoting Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983)). The ALJ has a duty to further develop the record where the evidence is ambiguous or the ALJ finds that the record is inadequate to allow for proper evaluation of the evidence. Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001). A specific finding of ambiguity or inadequacy in the record is not required to trigger the necessity to further develop the record where the record itself establishes the ambiguity or inadequacy. McLeod v. Astrue, 640 F.3d 881, 885 (9th Cir. 2011).

2. The Court finds the ALJ’s RFC Determination to be Supported by Substantial Evidence and Free from Remandable Legal Error

Plaintiff submits that because the only medical opinions of record were those of the state agency consultants who did not provide a functional analysis of Plaintiff’s impairments, the ALJ’s determination is based only on the ALJ’s own lay interpretation of the evidence, and is error. (Br. 11-12.) Plaintiff emphasizes the state physicians only reviewed a record that contained evidence from the cardiologists and Dr. Bichai through November of 2017. (AR 65-70.) Plaintiff submits these determinations did not address all of Plaintiff’s impairments and only noted examination findings of spinal tenderness (AR 69), and the ALJ found the opinions to be unpersuasive as they did not adequately consider Plaintiff’s spinal impairments. (AR 23.) Plaintiff argues the record was devoid of any medical opinions containing functional limitations, and thus the ALJ had a duty to develop the record and obtain a functional analysis regarding all of Plaintiff’s impairments, that was not “stale.” See Rodriguez-Curtis v. Astrue, No. CV 10-02794-VBK, 2011 WL 536598, at \*3 (C.D. Cal. Feb. 15, 2011) (“Certainly, if the ALJ felt that

1 this opinion was stale, he should have developed the record and ordered another consultative  
2 examination.”); Arriaga v. Berryhill, No. CV-16-0755-TUC-LCK, 2018 WL 1466234, at \*6 (D.  
3 Ariz. Mar. 26, 2018) (granting remand where the ALJ relied exclusively on the stale opinion of a  
4 non-examining consultant, and noting that the ALJ may need to obtain a current functional  
5 review by a consulting examiner); Huerta v. Astrue, No. 13-CV-01210-WHO, 2014 WL  
6 1866427, at \*16 (N.D. Cal. May 8, 2014).

7 The Court first discusses the cases presented by Plaintiff, which the Court finds to be  
8 largely distinguishable to the case at hand. In Rodriguez, the ALJ had specifically rejected a  
9 treating physician’s opinion for being four years old, and the district court found the ALJ  
10 improperly assessed newer medical exam findings in relation to the ALJ-assessed “stale”  
11 opinion. The court found the ALJ should have developed the record if the ALJ were to reject an  
12 uncontradicted treating physician opinion for such reason:

13 The Court reaches a similar conclusion with regard to the ALJ's  
14 reasoning that Plaintiff's lack of narcotic pain medication or  
15 physical therapy fails to support the exertional restrictions noted by  
16 Dr. Moses. Indeed, it is difficult to disagree with Plaintiff's  
contention that in making such an assessment, the ALJ was  
inserting his own medical opinion, which, of course, he is not  
qualified to do.

17 Finally, the ALJ discounts Dr. Moses’ opinion because it is over  
18 four years old. This is followed by the ALJ’s statement that  
19 “[Plaintiff] has continued to obtain positive straight leg results at  
20 follow up appointments, ...” (AR 26.) Certainly, if the ALJ felt that  
21 this opinion was stale, he should have developed the record and  
22 ordered another consultative examination. In any event, Dr.  
Moses’ opinions regarding Plaintiff’s exertional abilities would  
appear to be not inconsistent with later medical evidence in the  
record, and of course, there is no opinion in the record contrary to  
that of Dr. Moses.

23 The ALJ’S rejection of the opinion of the State Agency physician  
24 because it was premised on Dr. Moses’ evaluation is unsupportable  
for the same reasons.

25 Rodriguez-Curtis v. Astrue, No. CV 10-02794-VBK, 2011 WL 536598, at \*3 (C.D. Cal. Feb. 15,  
26 2011).

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1 In Arriaga, the ALJ gave “great weight” to the state reviewers that conducted a review in  
2 2014, and rejected the only opinion from the 18 month period prior to the ALJ’s decision:

3 Because the Court is remanding the matter for further  
4 development, it need not rule on Arriaga’s claim that the ALJ erred  
5 in not further developing the record and obtaining the testimony of  
6 a vocational expert. At the hearing, the ALJ noted that the record  
7 he was looking at was a “different animal” than had been reviewed  
8 in the earlier administrative proceedings. (AR 84.) The Court  
9 agrees. Arriaga began experiencing significant anger and  
10 depression in November 2013. (AR 444.) He first reported  
11 auditory and visual hallucinations in July 2014. (AR 464.) The  
12 state agency examiners, to whom the ALJ gave great weight,  
13 conducted their reviews in January and April 2014. (AR 412-28,  
14 463.) Therefore, these reviewers had not seen the scope of  
15 Arriaga’s 2014 mental health records documenting his developing  
16 symptoms including psychosis. The ALJ rejected the only opinion  
17 on Arriaga’s functional abilities by a mental health professional  
18 (psychiatric nurse practitioner Banzinger) that had examined  
19 Arriaga in the 18 months prior to the ALJ’s decision. Instead, the  
20 ALJ based the RFC entirely on the stale opinions of non-  
21 examining physicians. After the ALJ reconsiders the opinions of  
22 Banzinger and Martinez, he may need to obtain a current  
23 functional review by a consulting examiner. Additionally, the  
24 testimony of a vocational expert may be necessary after the ALJ  
25 re-determines Arriaga’s non-exertional limitations.

15 Arriaga v. Berryhill, No. CV-16-0755-TUC-LCK, 2018 WL 1466234, at \*6 (D. Ariz. Mar. 26,  
16 2018).

17 While not cited by the parties, the Court notes that it has in fact recommended remand  
18 under a similar theory as presented by Plaintiff here. However, the Court finds such case  
19 distinguishable similarly to the cases cited by Plaintiff here. Like Arriaga, in Hoskins, the  
20 undersigned found the ALJ erred in giving great weight to the non-examining state physicians’  
21 opined RFC determinations. The non-examining state physician opinions were dated June 19,  
22 2014, and October 13, 2014, whereas the record contained MRIs and a treating physician exam  
23 notes with new objective findings in October of 2014, and March/April of 2016:

24 However, as described previously herein, Plaintiff had subsequent  
25 lumbar and cervical MRIs conducted on October 29, 2014 (AR  
26 460-62, 492-93), and an additional lumbar MRI on March 16, 2016  
27 (AR 503-505). Additionally, Dr. Ereso’s exam notes dated April  
28 11, 2016, also showed new limited range of motion testing and  
greater limitation particularly in the shoulder, following a physical  
exam. (AR 510-12.) Although this evidence was considered by the  
ALJ (AR 27-28), this exam record and the two most recent MRIs  
were not reviewed by the state agency physicians, and thus, there

1 is no state medical opinion addressing Plaintiff's residual  
2 functional capacity after reviewing these records. As discussed  
3 previously, although these records do not demonstrate the ALJ  
4 erred in assigning little weight to Dr. Ereso's opinions, it was error  
5 to give great weight to the state agency physicians' RFC  
6 determinations when they did not have access to these most recent  
7 records. The most recent MRIs may show additional limitations  
8 greater than demonstrated by the objective evidence available to  
9 the state physicians at the time of their review.

10 Hoskins v. Comm'r of Soc. Sec., No. 117CV01520LJOSAB, 2019 WL 423128, at \*14 (E.D. Cal.  
11 Feb. 4, 2019), report and recommendation adopted, No. 117CV01520LJOSAB, 2019 WL  
12 1004573 (E.D. Cal. Feb. 28, 2019). The Court did not find this equated to error in the assigning  
13 of little weight to the opinion of the treating physician, however found error in assigning great  
14 weight to the non-examining physician opinions. Thus, in these above cases, the ALJ erred by  
15 assigning great weight to non-examining physicians' RFC assessments that had not reviewed  
16 significant objective evidence, and in the face of opposing treating physician RFC assessments.  
17 Further, and naturally, there is no clear line rule that an ALJ must completely reject any  
18 assessment made before other objective medical results appear in the record, and there has to be  
19 a limit to any requirement that an ALJ have independent medical review of objective medical  
20 testing that may come in close in time to a hearing or decision. See Elsey, 782 Fed.Appx. at 637  
21 ("Additionally, the fact that [reviewing physician] Dr. Hale did not consider all of the evidence  
22 in his determination does not require the ALJ to discount his opinion.").

23 Similarly, in Fox, the undersigned found error under such theory. However, the  
24 circumstances were again more drastic:

25 Nonetheless, the Court finds the ALJ erred in her RFC  
26 determination as there were objective medical testing imaging  
27 results in the record that were not analyzed by any doctor or  
28 medical expert, and no opinion as to how those medical imaging  
results would impact Plaintiff's ultimate RFC or limitations  
generally. Following the state agency's reconsideration review on  
September 18, 2015 (AR 71-72), Plaintiff received a CT scan on  
March 8, 2016, which showed advanced disc degenerations at T11-  
12, T12-L1, L1-L2, L2-L3, and L5-S1. (AR 474.) On June 15,  
2016, Dr. Wahba opined that the CT scan showed multilevel  
moderate to severe spondylosis with moderate degenerative disc  
disease at T12-L1, L1-2, and L2-3, as well as severe degenerative  
disc disease at L5-S1 with foraminal stenosis bilaterally greater on  
the right than on the left. (AR 478.) Dr. Wahba recommended an  
MRI to determine if there was any focal stenosis. (Id.) The

subsequent June 24, 2016 MRI showed: (1) degenerative changes most marked at L5-S1, with a mild canal, and severe right and moderate to severe left-sided foraminal stenosis; (2) mild canal stenosis and mild to moderate bilateral foraminal stenosis at T12-L1, L1-2, L2-3, and L4-5; and (3) mild canal stenosis with no compression upon the underlying thoracic spinal cord at T10-11 and T11-12. (AR 442.)

The ALJ only passingly refers to the objective medical imaging results in her opinion. In reviewing the March 8, 2016 CT scan, the ALJ acknowledged it showed disc degeneration, however did not restate that it showed “advanced” disc degeneration. (AR 20-21.) In her review of the June 2016 MRI, the ALJ acknowledged that it showed mild to moderate degenerative disc disease and mild to severe stenosis, but the ALJ's only explanation of this record is that it showed no compression of the underlying spinal cord. (AR 21.) The ALJ did not explain the impact of the 2016 MRI results showing mild to severe stenosis despite Dr. Wahba's explicit recommendation to obtain an MRI to determine the presence of stenosis. (AR 21, 478.) . . .

. . . The Court is unable to determine how the ALJ arrived at the conclusion that Plaintiff was capable of light work. Further, there is no medical opinion opining on how the most recent medical imaging would impact Plaintiff's ultimate RFC. Absent adequate explanation of the record, without specific support from a medical source, and with no testimony from a medical expert, the ALJ appears to have defined her own limitations for Plaintiff. The Court finds that this was error.

Fox v. Comm’r of Soc. Sec., No. 119CV00146LJOSAB, 2019 WL 6724355, at \*14–15 (E.D. Cal. Dec. 11, 2019), report and recommendation adopted, No. 119CV00146LJOSAB, 2020 WL 469363 (E.D. Cal. Jan. 29, 2020); see also Daniel Garcia v. Comm’r of Soc. Sec., No. 1:18-CV-00914-SAB, 2019 WL 3283171, at \*7 (E.D. Cal. July 22, 2019) (“The ALJ’s reliance and characterization of the cervical MRI as generally unremarkable despite the disk protrusion and straightening of the normal lordotic curvature, without a doctor or medical expert's review and analysis of the MRI to support such characterization, was not a specific and legitimate reason based on substantial evidence to reject Dr. Calhoun's opinion. While the ALJ accurately described that the neural foramina were not compromised, the comment that the MRI was unremarkable was not proper, and the ALJ’s use of the MRI as a basis to reject Dr. Calhoun's opined limitations was error. Further, the ALJ erred in assigning great weight to non-examining state expert Dr. Trias’ opinion. Although the cervical MRI was considered by the ALJ, the MRI was not reviewed by the state agency physician, and thus, there is no state medical opinion

1 addressing Plaintiff's residual functional capacity that considers the cervical MRI.”).

2 Here, for similar reasons discussed in the severity analysis of this order, the ALJ did not  
3 err in considering the non-examining state physician opinions as persuasive in one manner in the  
4 severity analysis, and finding them not persuasive as to the RFC analysis, and specifically did  
5 not err due to the fact the Plaintiff did receive medical imaging after the time of the state agency  
6 physician issue their findings. See Meadows v. Saul, 807 F. App'x 643, 647 (9th Cir. 2020)  
7 (“[A]lthough the non-examining state agency physicians did not review any evidence beyond  
8 August 2014, the ALJ did not err in giving great weight to the physicians’ opinions. There is  
9 always some time lapse between a consultant’s report and the ALJ hearing and decision, and the  
10 Social Security regulations impose no limit on such a gap in time. At the time they issued their  
11 opinions, the non-examining experts had considered all the evidence before them, satisfying the  
12 requirements set forth in 20 C.F.R. § 404.1527(c)(3).”).

13 In Huerta, also cited by Plaintiff, the court found compounding error where the ALJ  
14 rejected the opinions of a treating physician, an examining consultant, and a medical expert, but  
15 relied on a “stale” opinion from a non-examining consultant to make a determination on the  
16 timing of a period of disability, that was inconsistent with the timing of the opinion and evidence  
17 relied upon in that opinion:

18 More problematic, however, is that the ALJ herself determined that  
19 Huerta was disabled through May 31, 2009. Yet, the ALJ relied on  
20 Hartman's June 24, 2009 RFC (which was based on Huerta's  
21 medical records through May 2009), to find her *not* limited enough  
22 to be disabled as of June 1, 2009. The ALJ failed to explain what  
23 she found in Hartman's review or RFC to support her own changed  
24 position as to Huerta's functional capacity as of June 1, 2009.  
25 Because the ALJ does not explain why she rejected Dr. Hartman's  
26 opinion from the period of March 21, 2008 through May 31, 2009,  
27 but accepted Dr. Hartman's opinion thereafter, the ALJ's reliance  
28 on Dr. Hartman was error.

24 In sum, the ALJ improperly discounted the opinions of Huerta’s  
25 treating physician, as well as the opinion of an examining  
26 consultant and the favorable testimony of the medical examiner.  
27 Instead, the ALJ relied strongly on a stale RFC from a non-  
28 examining consultant that itself contradicted the ALJ's own  
determination as to Huerta’s RFC through May 31, 2009. These  
errors impacted the RFC determination and require remand.

Huerta also argues that the ALJ erred in: (i) discounting Dr.

Ware's February 2011 RFC; (ii) discounting Dr. Sandoval's November 13, 2010 RFC as well as her testimony during the hearing; (iii) discounting Dr. Garren's April 2010 opinion as to capacity; and (iv) the ALJ's out of context reliance on Dr. Wu's opinion that Huerta's prognosis was "good," when Dr. Wu's prognosis, as Huerta's oncologist, was limited her lymphoma. These doctors provided consistent evidence supporting Huerta's symptoms and limitations, as did Huerta herself and the lay witnesses. They provide further proof, although none is needed, that remand is necessary in this case.

Huerta v. Astrue, No. 13-CV-01210-WHO, 2014 WL 1866427, at \*15–16 (N.D. Cal. May 8, 2014) (footnote omitted). The Court finds these compounding errors in the ALJ's analysis in Huerta to be wholly dissimilar to the ALJ's analysis in the case at hand. Having preliminary discussed and found the Plaintiff's legal theory inapplicable here, the Court now turns to further discussion of the record, the parties' arguments, and the ALJ's analysis.

In addition to the state agency consultants not having access to records regarding Plaintiff's hand impairments, the consultants did not review records regarding Plaintiff's MRI results demonstrating impression on the right S1 nerve root. Plaintiff argues the ALJ was left with no updated medical opinion to interpret the raw medical data into functional limitations, Padilla v. Astrue, 541 F. Supp. 2d 1102, 1106 (C.D. Cal. 2008) ("[A]s a lay person, an ALJ is 'simply not qualified to interpret raw medical data in functional terms.' ") (quoting Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir.1999); Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir.1975)); see also Garcia, 2019 WL 3283171, at \*7. Plaintiff argues the ALJ should have obtained an updated medical opinion to interpret the raw medical data in the MRI report depicting nerve root impression into functional limitations, rather than rely on her own interpretation.

The Court first notes that in Padilla, cited by Plaintiff, the court found the ALJ improperly relied on a non-examining physician expert whose opinion the court found to be inconsistent and ambiguous:

Here, based solely on the testimony of Dr. Gerber, the ALJ found plaintiff does not have a severe impairment or combination of impairments. See A.R. 26 ("According to Dr. Gerber, who reviewed the medical evidence of record prior to the hearing, the [plaintiff's] impairments do not meet or equal a Listing, and ... she is not functionally impaired. [¶] The undersigned agrees with Dr. Gerber's assessment."). However, in addition to opining plaintiff

1 does not have a severe impairment, A.R. 310–11, Dr. Gerber  
 2 agreed with Dr. Siciarz's opinion that plaintiff can perform the  
 3 “medium range of activity with the addition of [a] seizure  
 precaution...” A.R. 311. These opinions of Dr. Gerber's are  
 inconsistent and ambiguous.

4 When, a claimant's impairments limit her to medium work activity,  
 5 such impairments are by definition “severe” since they have more  
 6 than a minimal impact on the claimant's ability to lift, which is a  
 7 basic work activity. *See, e.g., Hughes v. Barnhart*, 206 F.Supp.2d  
 8 771, 781 (W.D.Va.2002) (The claimant's “physical condition  
 9 cannot be classified as nonsevere under the regulations” when  
 10 “[t]he uncontradicted memedical evidence reveals that [the  
 11 claimant] was restricted ... to the performance of medium  
 12 work.”); *Camacho v. Apfel*, 1998 WL 813409, \*7 (E.D.N.Y.)  
 13 (“Since lifting is itself a basic work activity, a limitation in that  
 14 regard requires a finding of a severe impairment.” (citations  
 15 omitted)). In fact, Dr. Siciarz, with whom Dr. Gerber agreed, found  
 16 plaintiff “is **limited** due to diabetes and hypertension.” (emphasis  
 added). Yet, Dr. Gerber concluded plaintiff is not limited, or does  
 not have a severe impairment. This ambiguity should have  
 triggered the ALJ's duty to further develop the record, and having  
 failed to do so, the ALJ could not rely on Dr. Gerber's opinion to  
 support his Step Two determination that plaintiff is not severely  
 impaired. Thus, the ALJ's Step Two determination is not supported  
 by substantial evidence.<sup>6</sup> *See, e.g., Burnett v. Barnhart*, 2004 WL  
 1093271, \*10–11 (N.D.Ill.) (ALJ's decision not supported by  
 substantial evidence in part because ALJ relied on testimony of  
 medical expert without addressing internal inconsistencies in such  
 testimony).

17 Padilla, 541 F. Supp. 2d at 1106–07. Thus, the circumstances in Padilla are readily  
 18 distinguishable from here.

19 Turning to the MRI record here, dated August 8, 2018, the record notes: “Possible disc  
 20 bulge or protrusion at L5/S1 with slight impression on the descending component of the right S1  
 21 nerve root in the right lateral recess. Consider dedicated imaging of the lumbar spine for further  
 22 assessment, if clinically indicated. Mild pubic symphysisitis. No large masses are seen in the  
 23 right hemipelvis. No evidence for inguinal hernia. If symptoms persist, consider CT.” (AR  
 24 307.) The physical examination on that date also noted under back, “mild spinal tenderness” and  
 25 good range of motion. (AR 307.)

26 ///

27 //

28 ///

1 In the RFC analysis section of the opinion, the ALJ made the following findings  
2 regarding the course of records pertaining to Plaintiff's back impairments, which the ALJ did  
3 find to be severe:

4 The record does not contain any opinions from treating or  
5 examining physicians indicating that the claimant has limitations  
6 greater than those determined in this decision.

7 The record reveals that the claimant was seen for a general medical  
8 checkup in January 2017. Examination of the back did not show  
9 any spinal tenderness and range of motion was good. He was  
10 started on baclofen for muscle spasms in March 2017 . . . During a  
11 cardiology evaluation in April 2017, it was none of the claimant  
12 [sic] also had a history of methamphetamine use . . . Examination  
13 of the back in May 2017 did not demonstrate any spinal tenderness  
14 and range of motion was noted to be good. Physical examination  
15 in August 2017 revealed mild spinal tenderness. He was  
16 diagnosed with spondylosis and prescribed Norco . . . In August  
17 and September 2017, examination of the back did not show any  
18 spinal tenderness and range of motion was good (Ex. 4F).

19 In August 2018, the claimant complained of low back pain.  
20 Examination demonstrated mild spinal tenderness and good range  
21 of motion. Pelvic MRI revealed possible disc bulge or protrusion  
22 at L5-S1 with slight impression on the descending component of  
23 the right S1 nerve root in the right lateral recess. He was given a  
24 refill of Norco. Later in the month, examination of the back did  
25 not reveal any spinal tenderness and range of motion was still good  
26 . . . In November 2018, the claimant said that he had recently  
27 moved to Hanford to take care of his mother after his stepfather  
28 passed away . . . In February 2019, he reported that he was in the  
process of moving both himself and his mother . . . The claimant  
complained of back pain in May 2019. Examination showed  
spinal tenderness, but range of motion was good . . . His  
prescription for Norco was refilled June 2019. Examination the  
following month demonstrated no spinal tenderness and good  
range of motion . . .

21 . . . As for medical opinion(s) and prior administrative medical  
22 finding(s), the undersigned cannot defer or give any specific  
23 evidentiary weight, including controlling weight, to any prior  
24 administrative medical finding(s) or medical opinion(s), including  
25 those from medical sources. The undersigned has fully considered  
26 the medical opinions and prior administrative medical findings as  
27 follows:

28 The State Agency consultants' assessments found that the claimant  
did not have a severe impairment (Exs. 1A, 3A). The undersigned  
finds these opinions to be unpersuasive because they did not  
adequately consider the claimant's lumbar spine impairment in  
combination with his obesity, which would reasonably cause some  
functional limitations.

1 Based on the foregoing, the undersigned finds the claimant has the  
2 above residual functional capacity assessment, which is supported  
3 by the substantial weight of the objective medical evidence that  
4 demonstrated minimal treatment, the conservative treatment that  
5 consisted of only a prescription for Norco and baclofen without a  
6 referral to physical therapy or a spine specialist, the multiple  
7 occasions wherein no spinal tenderness was found upon  
8 examination, the good range of motion, the rather good extent of  
9 the claimant's activities of daily living that include cooking,  
10 shopping, cleaning and caring for his mother as well as the fact  
11 that no treating or examining physician has provided greater  
12 functional limitations (Exs. 1F, 2F, 4F, 7F, 9F, 10F, 11F, 12F,  
13 testimony).

14 The undersigned finds that even if the claimant continued to use  
15 methamphetamine, he would be able to perform the range of work  
16 described above.

17 (AR 22-23.)

18 The Court has reviewed the records cited by the ALJ. Plaintiff does not dispute the  
19 accuracy of the course of records pertaining to the spine before and after the MRI and the ALJ's  
20 summarization thereof. These records show: in May of 2017, Dr. Bichai noted no spinal  
21 tenderness and good range of motion in Plaintiff's back on examination (AR 22, 244); in August  
22 2017, Dr. Bichai documented mild spinal tenderness in Plaintiff's back (AR 22, 293); in  
23 September 2017, Plaintiff visited Dr. Bichai for a refill of Norco because of low back pain,  
24 spondylosis, and shoulder pain, and during examination, Dr. Bichai noted mild spinal tenderness  
25 (AR 22, 241-242); in September 2017, Dr. Bichai noted no spinal tenderness and good range of  
26 motion in Plaintiff's back (AR 22, 290); in October 2017, Dr. Bichai observed that Plaintiff had  
27 spinal tenderness but showed good range of motion in his back (AR 22, 288); ten months later, in  
28 August 2018, Plaintiff visited Dr. Bichai with right abdominal pain that radiated to his right low  
back, and Dr. Bichai noted that he refilled Plaintiff's Norco prescription at a prior visit but  
Plaintiff forgot it in his wallet and was never filled; Dr. Bichai mentioned that Plaintiff had a  
renal cyst and underwent the MRI scan summarized above, and noted dedicated lumbar  
imagining might be needed if clinically indicated (AR 22, 307, 310); during the August 2018  
examination, Dr. Bichai observed mild spinal tenderness and good range of motion, and Dr.  
Bichai refilled Norco stating that it must last a month (Tr. 22, 307, 310); at a later exam in

1 August 2018, Dr. Bichai observed no spinal tenderness and good range of motion in Plaintiff's  
2 back, and Dr. Bichai assessed Plaintiff with spondylosis/low back pain, recommended that  
3 Plaintiff continue weight loss, and refilled his Norco prescription (AR 22, 304-305, 312-313); in  
4 June 2019, Plaintiff followed up and Dr. Bichai noted spinal tenderness but that Plaintiff had  
5 good range of motion in his back, assessed low back pain and refilled Plaintiff's Norco  
6 prescription (AR 22, 334-336); and in July 2019, Dr. Bichai observed no spinal tenderness and  
7 good range of motion in Plaintiff's back (AR 22, 338).

8         Given the extent of Plaintiff's treatment records regarding his back that only shows  
9 conservative treatment and minimal examination findings without referrals to physical therapy or  
10 a back specialist, Defendant argues substantial evidence supports the ALJ's RFC finding for  
11 medium work. The Court agrees. Based on the course of treatment records, the ALJ's review  
12 and analysis of such records, as well as her reliance and weighing of all of the evidence of the  
13 record, the Court finds no error in the fact that the consultants' opinions were issued without  
14 reviewing the August 2018 MRI results, particularly considering the course of examinations and  
15 treatment did not change following such date. Again, the ALJ did not err in considering the non-  
16 examining state physician opinions as persuasive in one manner in the severity analysis, and  
17 finding them not persuasive as to the RFC analysis, and specifically did not err due to the fact the  
18 Plaintiff did receive medical imaging after the time of the state agency physician issued their  
19 findings. See Meadows, 807 F. App'x at 647; Owen v. Saul, 808 F. App'x 421, 423 (9th Cir.  
20 2020) (ALJ properly relied on consultants' assessments over two treating medical opinions  
21 because "there is always some time lapse between a consultant's report and the ALJ hearing and  
22 decision, and the Social Security regulations impose no limit on such a gap in time").<sup>5</sup> The

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23 <sup>5</sup> In Plaintiff's reply brief, Plaintiff proffers that Defendant's briefing does not mention or otherwise address the  
24 2018 MRI results demonstrating right S1 nerve compression in her recitation of that evidence, and that this raw data  
25 required interpretation into function-by-function limitations by a qualified medical expert. The Court notes  
26 Plaintiff's representation is not accurate, as in Defendant's briefing the August 2018 MRI is summarized as follows:  
27 "Dr. Bichai noted that Plaintiff had a renal cyst and underwent a magnetic resonance imaging (MRI) scan (Tr. 22,  
28 306-307, 309-310). Dr. Bichai observed that the MRI showed a possible disc bulge or protrusion at the L5/S1  
(lumbar) level with slight impression of nerve root involvement on the right side (Tr. 22, 307, 310). Dr. Bichai noted  
to consider a dedicated imagining of the lumbar spine for further assessment if clinically indicated (Tr. 22, 307,  
310)." (Opp'n 6.) The record is again mentioned in Defendant's briefing, though without the reference to the S1  
nerve, stating: "Dr. Bichai mentioned that Plaintiff had a renal cyst and underwent a MRI scan that showed a  
possible lumbar degenerative changes (Tr. 22, 306-307, 309-310), and noted that dedicated lumbar imagining might

1 Court does not find the record to be inadequate or ambiguous, and the ALJ's RFC determination  
2 was not deficient for such reason. See Ford, 950 F.3d at 1156; Mayes, 276 F.3d at 459-60. The  
3 record was adequate for the ALJ to reach a conclusion, and the facts in this case are not similar  
4 to other instances in which the ALJ was found to have a duty to further develop the record. See  
5 Tonapetyan, 242 F.3d at 1150-51 (ALJ erred by relying on testimony of physician who indicated  
6 more information was needed to make diagnosis); McLeod, 640 F.3d at 887 (ALJ erred by  
7 failing to obtain disability determination from the Veteran's Administration); Bonner v. Astrue,  
8 725 F.Supp.2d 898, 901-902 (C.D. Cal. 2010) (ALJ erred where failed to determine if claimant's  
9 benefits were properly terminated or should have been resumed after his release from prison);  
10 Hilliard v. Barnhart, 442 F.Supp.2d 813, 818-19 (N.D. Cal. 2006) (ALJ erred by failing to  
11 develop record where he relied on the opinion of a physician who recognized he did not have  
12 sufficient information to make a diagnosis).

13 Further, as the ALJ noted, "[t]he record does not contain any opinions from treating or  
14 examining physicians indicating that the claimant has limitations greater than those determined  
15 in this decision." (AR 23.) Considering the caselaw discussed above regarding Plaintiff's theory  
16 and the previous recommendations of this Court, and the Court's view of an absence of a bright  
17 line rule as to when an ALJ may need to obtain further medical expert review of objective  
18 medical testing results, the Court finds no error. Plaintiff has not provided legal authority that  
19 requires an ALJ to rely on a medical source opinion obtained after a certain point in the patient's  
20 medical history, in order to determine the RFC. The ALJ was not required to adopt the findings  
21 or opinion of any of physician, but rather was required to determine the RFC based on all of the  
22 evidence in the record. See 20 C.F.R. § 404.1527(d)(2) ("Although we consider opinions from  
23

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24 be needed if clinically indicated (Tr. 22, 307, 310)." (Opp'n 18.) More importantly, as summarized above, the ALJ  
25 discussed the August 2018 MRI results including the "possible disc bulge or protrusion at L5-S1 with slight  
26 impression on the descending component of the right S1 nerve root in the right lateral recess." (AR 23.) The Court  
27 does not find the ALJ was improperly interpreting the raw medical data and translating or incorporating the MRI  
28 results into an RFC, but was rather considering that record as part of a whole continuum of treatment records  
pertaining to the back pain complaints, with the timeline of such records, as described by the ALJ, evidencing a lack  
of change in exam findings, treatment, or follow up with further imaging, physical therapy, or referral to specialist.  
There is not an absence of medical visits following the MRI results, but rather numerous follow-up visits with no  
such described actions taken.

1 medical sources on issues such as . . . your residual functional capacity . . . the final  
 2 responsibility for deciding these issues is reserved to the Commissioner.”); Rounds v. Comm’r of  
 3 Soc. Sec., 807 F.3d 996, 1006 (9th Cir. 2015) (“the ALJ is responsible for translating and  
 4 incorporating clinical findings into a succinct RFC”); Vertigan v. Halter, 260 F.3d 1044, 1049  
 5 (9th Cir. 2001) (“It is clear that it is the responsibility of the ALJ, not the claimant’s physician, to  
 6 determine residual functional capacity.”). The Court notes that the regulations provide the  
 7 following guidance for utilizing evidence in assessing an RFC, and allows for ordering a  
 8 consultative exam “if necessary”:

9 (3) Evidence we use to assess your residual functional capacity.  
 10 We will assess your residual functional capacity based on all of the  
 11 relevant medical and other evidence. In general, you are  
 12 responsible for providing the evidence we will use to make a  
 13 finding about your residual functional capacity. (See §  
 14 404.1512(c).) However, before we make a determination that you  
 are not disabled, we are responsible for developing your complete  
 medical history, including arranging for a consultative  
 examination(s) if necessary, and making every reasonable effort to  
 help you get medical reports from your own medical sources.

15 20 C.F.R. § 404.1545(a)(3). The Court finds the ALJ had not further duty to “develop[]  
 16 [Plaintiff’s] complete medical history,” but rather the complete medical history was before the  
 17 ALJ when she issued her decision.

18 The Court finds the ALJ’s RFC determination to be proper, reasonable, based on  
 19 substantial evidence in the record, and not deficient due to any lack of a certain type of medical  
 20 opinion issued after the date of the August 2018 MRI, nor due to the fact the non-examining state  
 21 physicians did not review the records pertaining to the Plaintiff’s hand and wrist conditions. See  
 22 Brown v. Berryhill, 697 F. App’x 548, (Mem)–549 (9th Cir. 2017) (“The ALJ’s determination  
 23 that Brown was not disabled due to carpal tunnel syndrome and inclusion of a limitation of  
 24 ‘frequent handl[ing]’ in the RFC also are supported by substantial evidence. The existence of  
 25 Brown’s carpal tunnel syndrome alone is insufficient to establish functional limitations or  
 26 disability . . . the records of Brown’s treating physician indicate that Brown had normal strength  
 27 and full mobility of his hands and fingers both before and after his carpal tunnel release surgery.  
 28 Because the record evidence was not ambiguous and the record was sufficient to allow for proper

1 evaluation of the evidence, the ALJ was not required to re-contact Brown's doctors or further  
2 develop the record."); Karen E. v. Berryhill, No. ED CV 17-918-SP, 2019 WL 1405835, at \*3  
3 (C.D. Cal. Mar. 27, 2019) ("Certainly it may have been helpful for the ALJ to retain a medical  
4 expert to review these records, but it was not necessarily required where, as here, the ALJ  
5 reviewed the substantial medical evidence that supported his RFC determination with respect to  
6 plaintiff's lower back pain."). The ALJ did not wholly reject or rely on the findings of these state  
7 agency physicians, but rather assigned weight to the state agency physicians according to the  
8 evidence in the record, and their applicability to the relevant analysis (*i.e.* severity vs. RFC  
9 analysis discussed above).

10 Accordingly, the Court finds the ALJ's RFC assessment to be based on substantial  
11 evidence in the record and free from remandable error, and Plaintiff has not demonstrated that  
12 the ALJ erred by failing to further develop the record.

13 **V.**

14 **ORDER AND RECOMMENDATION**

15 Based on the foregoing, it is HEREBY ORDERED that the Clerk of Court is directed to  
16 randomly assign a District Judge to this action.

17 For the reasons explained herein, the Court finds that the ALJ did not err in her step two  
18 determination that Plaintiff's carpal tunnel syndrome and hand/wrist ailments were not severe;  
19 and did not err in making her residual functional capacity determination or in failing to develop  
20 the record in relation to the RFC determination. The Court finds the ALJ's decision to be  
21 supported by substantial evidence in the administrative record, and free from remandable legal  
22 error. Accordingly, IT IS HEREBY RECOMMENDED that Plaintiff's appeal from the  
23 decision of the Commissioner of Social Security be DENIED; that judgment be entered in favor  
24 of Defendant Commissioner of Social Security and against Plaintiff Arthur Eugene Herrera; and  
25 that the Clerk of the Court be directed to close this action.

26 These findings and recommendations are submitted to the district judge assigned to this  
27 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen  
28 (14) days of service of this recommendation, any party may file written objections to these

1 findings and recommendations with the Court and serve a copy on all parties. Such a document  
2 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The  
3 district judge will review the magistrate judge’s findings and recommendations pursuant to 28  
4 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified  
5 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th  
6 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

7  
8 IT IS SO ORDERED.

9 Dated: April 20, 2022

  
UNITED STATES MAGISTRATE JUDGE